No. 79-1892

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In the Supreme Court of the United States

OCTOBER TERM, 1979

LAREDO COCA-COLA BOTTLING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board reasonably exercised its remedial authority by requiring the employer to reimburse the employees for an unlawfully withheld Christmas bonus.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 613 F. 2d 1338. The decision and order of the National Labor Relations Board are reported at 241 N.L.R.B. No. 21.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1980 (Pet. App. 10a). A petition for rehearing was denied on April 17, 1980 (Pet. App. 9a). The petition for a writ of certiorari was filed on May 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, is set forth at page 5 of the petition.

STATEMENT

In August 1977, Local 1110, Brewery, Soft Drink, Grain, Flour, Candy, Industrial and Allied Workers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union"), was certified as the bargaining agent of a unit of petitioner's ("the Company's") employees (R. 574).[1] Thereafter, the Company and the Union began a series of collective bargaining meetings, but no agreement was reached; on November 18, the

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[1]The Company manufactures, sells, and distributes soft drinks (R. 572). "R." refers to the paginated volume of pleadings filed in the court of appeals. "Tr." refers to the transcript of testimony in the Board proceeding. Petitioner failed to reproduce the Board's decision and order in the appendix to its petition. We are lodging with the Clerk of the Court a copy of the paginated volume of pleadings, which contains that decision and order.

Union rejected the Company's "last offer" (*ibid.*). In December, the Company discontinued two employee savings funds and also its Christmas bonus; and, in January 1978, it eliminated the truck drivers' first quarter wage increment (R. 576-578, 580). In March, following additional collective bargaining meetings and the Union's filing of unfair labor practice charges, the unit employees went out on strike (R. 574).

The Board found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by coercively interrogating and threatening its employees during the Union's organizing campaign (R. 597-598).[2] The Board also found that the Company violated Sections 8(a)(5), (3) and (1) of the Act by making a change in the wage structure of its driver-salesmen, and by discontinuing its accounts receivable and Christmas savings funds and its Christmas bonus[3] without bargaining with the Union and

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[2]The Board found, *inter alia*, that the Company's president told the employees that there would be no Christmas bonus that year and that the funds that would otherwise be used to pay Christmas bonuses would be used to pay his attorney's expenses in opposing the Union (R. 585; Tr. 135, 190, 485, 533).

[3]In December 1974, all employees received a Christmas bonus of a case of Coca-Cola, a case of Budweiser beer, a canned ham, a fruitcake and a calendar (R. 578; Tr. 141). In December 1975, the employees again received this bonus. In addition, along with their regular paychecks, they were given bonus checks (R. 578; Tr. 142-143). Company President Gill told the employees that he was happy with them, that sales were high, and that they therefore were being paid a Christmas bonus (R. 578; Tr. 142). He also told them they could expect a Christmas bonus from then on (R. 578; Tr. 142, 490, 530). In December 1976, the employees were given a case of Coca-Cola and bonus checks. Gill again said that he was happy with the employees, that "sales were up again," and that they therefore were being paid a bonus (R. 578; Tr. 144). Although 1977 was a profitable year, the employees did not receive any bonus in December 1977. They were given no explanation for the Company's failure to give them a bonus (R. 579; Tr. 145-146).

in retaliation for the employees' union activities (R. 598). The Board further found that the Company violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with information concerning four benefit programs (R. 598). Finally, the Board found that the strike, which began on March 14, 1978, was an unfair labor practice strike from its inception (R. 599).

The Board ordered the Company, *inter alia*, to reinstate the discontinued benefits and make the employees whole for the loss of such benefits (R. 602). In ordering reinstatement of the Christmas bonus, the Board, adopting the decision of the Administrative Law Judge, rejected the Company's assertion that the bonus was "paid merely out of a fund derived from a 'dramatic increase' in *bottle sales*; * * * [rather than] on the basis of increased sales and [the Company's] ability to pay" (R. 600; emphasis in original). The Board also rejected the contention that the make-whole remedy was inappropriate because the exact amount of the bonus to be paid each employee was not known. It noted that "this case does not involve a speculation as to which unit employees would have received the Christmas bonus for the evidence of record demonstrates that *all* employees, unit employees and others, received the Christmas bonus" (*ibid.*; emphasis in original). The Board further noted that the exact amount due each employee could be determined in a back pay proceeding, if necessary (*ibid.*).

The court of appeals upheld the Board's decision and enforced its order. Concerning the Christmas bonus, the court agreed with the Board that the "company's promises and prior conduct" made the bonus a condition of employment that could not be discontinued without bargaining with the Union (Pet. App. 6a-7a).

ARGUMENT

1. Petitioner does not contest the Board's findings, sustained by the court of appeals, that it withheld the employees' 1977 Christmas bonus without first bargaining with the Union and in retaliation for the employees' selection of the Union as their representative. It contends, however, that the requirement of the Board's order that the employees be reimbursed for the wrongfully withheld bonus is an abuse of the Board's remedial authority under Section 10(c) of the Act, 29 U.S.C. 160(c),[4] because the amount of the bonus is "not capable of ascertainment" but is based on "speculation and conjecture" (Pet. 9). There is no merit to this contention, which depends in part on petitioner's attack on factual findings and a determination of witness credibility made by the Board.

Petitioner contends that the 1975 and 1976 bonuses were "based upon comparative increases in bottle sales of more than 33 percent, respectively, over corresponding sales for each of the previous years; on the other hand, the Company experienced a one percent *decrease* in 1977 comparative bottle sales" (Pet. 16-17). The Board found, however, that the Company based its bonuses, not on bottle sales alone, but on total profitability, discrediting the witness who testified that they were based on bottle sales only (R. 586-587). Nor does the fact that "there was no perceptible objective formula" by which to determine the amount of the bonuses (Pet. 16) negate the propriety of a make-whole remedy. *NLRB* v. *Hudson Transit Lines*,

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[4]Section 10(c) empowers the Board, upon finding that an unfair labor practice has been committed, to order the perpetrator "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the] Act * * *." A Board order that serves to restore the *status quo ante* is an appropriate remedial measure. See *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 539-541 (1943).

Inc., 429 F. 2d 1223, 1232 (3d Cir. 1970), cert. denied, 401 U.S. 911 (1971); *NLRB* v. *Darling & Co.*, 420 F. 2d 63, 66 (7th Cir. 1970). If the Board and the Company are unable to agree on the amount of the bonus, that question may be resolved in a supplemental compliance proceeding. Such a proceeding and its results would be subject to further review by the court of appeals should that prove necessary. See *NLRB* v. *Ellis and Watts Products, Inc.*, 344 F. 2d 67 (6th Cir. 1965); *NLRB* v. *C.C.C. Associates, Inc.*, 306 F. 2d 534, 539-540 (2d Cir. 1962).

2. The cases relied on by petitioner (Pet. 11-18) are factually distinguishable and as to all but one of them, any inconsistency with the court of appeals' decision here would represent only an intra-circuit conflict inappropriate for review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

While in *NLRB* v. *American Manufacturing Company of Texas*, 351 F. 2d 74 (5th Cir. 1965), the court declined to enforce the portion of the Board's order requiring the employer to resume trucking operations that had been unlawfully discontinued, it did so because this would have involved a substantial capital outlay of $150,000 to purchase a fleet of trucks that would be useless if, after good faith bargaining, the employer adhered to its original decision to use public carriers. Moreover, in the court's view, it was not necessary to afford the union "the economic pressure of this tentative, perhaps momentary, but nonetheless mandatory investment as an aid to the bargaining," since the court had ordered "back pay and reinstatement of the employees" who had been terminated as a consequence of the discontinuation of operations (351 F. 2d at 80-81). Here, on the other hand, the make-whole remedy does not involve such an extraordinary investment, and, because the bonus was a yearly event

that came due and payable in December, there is no possibility that the employer would be required to make an expenditure which could be rendered nugatory by good faith bargaining.[5]

In *NLRB* v. *Nello Pistoresi & Son*, 500 F. 2d 399 (9th Cir. 1974), the court refused to enforce a Board order requiring payment of a Christmas bonus because it found that the employees had no reasonable expectation of such a bonus in view of "the short [two-year] history and indefinite nature of the bonuses" (*id.* at 401). Here, by contrast, the court sustained the Board's findings that the Company had an established practice of giving Christmas bonuses going back at least three years, and that the Company had promised that the bonuses would continue (pages 2-3, *supra*).

Finally, in *NLRB* v. *W.R. Grace & Co.*, 571 F. 2d 279 (5th Cir. 1978), the employer, without bargaining with the union, discontinued production of a product called Monokote and permanently laid off four employees involved in producing the product. The Board ordered the employer to bargain with the union about the effects of eliminating the production of Monokote, to pay the four

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[5]In *NLRB* v. *Citizens Hotel Co.*, 326 F. 2d 501 (5th Cir. 1964), the court, although recognizing that "there are circumstances in which, to effectuate the dominant policy of collective bargaining in good faith, a restitution order is permissible or required," found that the circumstances there did not warrant the Board's order requiring payment of a Christmas bonus that had been unilaterally withheld (*id.* at 508). The court noted the employer's "history of continuous unprofitable operations, the necessity for invading capital or borrowing money by which to pay the Christmas bonus," and the fact that, apart from the single impermissible unilateral change, the "record shows no further or other obstruction, technical or otherwise, to bargaining" (*ibid.*). There is no history of unprofitable operations here, and, as shown (pages 2-3, *supra*), the Company not only withheld the bonus for an unlawful purpose, but engaged in other unfair labor practices.

employees their normal wages during the bargaining, and to establish a preferential hiring list containing the names of the four employees and offer them reinstatement should it resume production of Monokote. The court declined to enforce the preferential hiring requirement and the order to offer reemployment on the ground that they amounted to "the Board's compelling agreement by the company to a substantive contractual provision" (571 F. 2d at 283). The Board cannot "fashion remedies on the basis of an assumption as to what the parties would have agreed to absent an employer's failure to bargain in good faith" (*ibid.*). As shown above, the Christmas bonus here was an established feature of the employees' terms and conditions of employment, so the Board was not required to make any such assumption in the present case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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